No. 04-413

IN THE

Supreme Court of the United States

CITY OF ALBUQUERQUE, *et al.*,

Petitioners,

v.

RICK HOMANS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, NEW MEXICO PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF STATE PIRGs, COMMON CAUSE, PUBLIC CAMPAIGN, DEMOS, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RECLAIMDEMOCRACY.ORG IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

TheRestofUs.org is a non-profit, non-partisan organization whose mission is to reduce the undue influence of big money on the political process.[1] TheRestofUs.org works to inform

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members or their counsel, made a monetary

and educate mainstream Americans, including those in Albuquerque, New Mexico, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field. Our research indicates that voters favor mandatory spending limits, such as the Albuquerque regulations, when asked what they would do to improve our political process. The organization has an interest in engaging those citizens in the reform process, and the current perception that all spending limits are per se unconstitutional presents a significant barrier to the organization's work. TheRestofUs.org hopes the Court will take this opportunity to clarify the constitutionality of limits on campaign spending. TheRestofUs.org is also a strong proponent of the citizens initiative and referendum process and believes that federal courts should use caution in examining the regulation at issue here, which was approved by 90% of Albuquerque voters, not incumbents seeking to promote campaign rules that protect their self-interest.

The New Mexico Public Interest Research Group (New Mexico PIRG) is a non-partisan citizens organization that conducts research, public education, and advocacy on a host of issues that promote the public interest of New Mexico, including environmental preservation, consumer protection, and good government. Our interests in this case are: A) New Mexico PIRG members, who are solidly middleclass, will be less likely to have their voice heard in Albuquerque politics if large campaign expenditures allow those candidates backed by wealthy interests to be much more competitive than others; B) Albuquerque citizens will have less faith in the local political process in the absence of spending limits, thereby making it harder for New Mexico PIRG to engage them in civic affairs; and C) Albuquerque voters, including New Mexico PIRG members, will be less likely to hear from candidates representing the full range of political viewpoints

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contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

and less likely to be exposed to a robust policy debate and so will be less informed than they are under spending limits.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of New Mexico PIRG, other state PIRGs have an interest in enacting spending limits in their states. A clarification by the Court of the circumstances in which expenditure limits are constitutional would assist the State PIRGs in advocating for comprehensive campaign finance reform.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including New Mexico, Common Cause's mission is to ensure open, accountable and effective government at the federal, state and local level. Common Cause has an affiliated state organization in New Mexico and has approximately 1,600 members in the state and 600 in the city of Albuquerque. Common Cause has a longstanding concern with problems in the nation's campaign finance system, including publicly advocating for the spending limit provisions of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 and participating in the defense of FECA before the Supreme Court.

Public Campaign is a non-profit, non-partisan organization dedicated to sweeping campaign reform that aims to dramatically reduce the role of big special-interest money in American politics. Public Campaign is laying the foundation for reform by working with a broad range of organizations, ranging from community groups, including some from the state of New Mexico, that are fighting for change in their states, to national organizations whose members are not fairly represented under the current campaign finance system.

For example, Public Campaign has worked extensively with a statewide coalition called New Mexicans for Campaign Reform (NMCR), which is a coalition of approximately 20 civic, consumer, environmental, faith-based and labor organizations dedicated to reducing the role of private money in New Mexico politics. It is our belief that more citizens of Albuquerque will run for office and become more interested in local political affairs if Albuquerque's campaign spending limits are upheld.

Demos is a non-profit organization whose purpose is to help build a society in which America can achieve its highest ideals. We believe that requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Campaign spending limits, like those adopted by Albuquerque's citizens, help foster these goals by reducing the appearance of impropriety in political campaigns and increasing electoral competition, and allowing more of the electorate's voice to be heard.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan organization that through litigation enables Americans, including those from Albuquerque, New Mexico, to focus on the lack of integrity at all levels of government. CREW's aim is to encourage officials to be open about their values and act based upon their honest and best assessment of the public interest, and CREW believes that campaign-spending limits, like those approved by the Albuquerque electorate, are an effective way to accomplish this goal.

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Albuquerque residents. The organization works to build a genuinely representative democracy based on the principle that each citizen's ability to influence our elections and government should result from a combination of the quality of a person's ideas and the energy put into promoting them, independent of one's

financial status. If wealth is a determining factor in the ability of either voters or candidates to make their voices heard in electoral races, we will have failed to meet the Constitution's promise of "equal protection of the laws." ReclaimDemocracy.org asks the Court to affirm the right of Albuquerque citizens to place reasonable limits on campaign spending in order to protect the equal protection guarantee of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional national importance: whether interests beyond those addressed in *Buckley v. Valeo*, 424 U.S. 1 (1976), can justify locally enacted campaign expenditure limits governing candidates for local office. In an effort to address on a local scale problems striking at the heart of democratic government, the citizens of Albuquerque, New Mexico, passed in 1974 a referendum limiting donations to and expenditures on behalf of candidates for city-wide office. While the expenditure limits were in force, they encouraged greater trust in the validity of local elections and fostered broader electoral competition and public participation. *See* Homans App. 234-237, 316-320, 325, 352-353.[2] Nearly 30 years later, the Tenth Circuit invalidated Albuquerque's expenditure limits based on what amounted to a "fatal in fact"[3] strict scrutiny review – an application of *Buckley* that imposed, in effect if

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[2] References to "Homans App." are to Defendant-Appellants' Appendix in the Court of Appeals.

[3] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

not in words, a bright-line prohibition on expenditure limits in local elections.[4]

As the Court has recognized at least since *Buckley*, unfettered campaign donations to and expenditures for political campaigns can create an appearance of impropriety and a perception that elected officials respond only to the special interests from which the money flows, thereby diminishing citizens' confidence in government and discouraging citizens from participating. *See Buckley*, 424 U.S. at 26-27, 46-47; *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 662-663 (2003); *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Campaign-finance laws enacted in the wake of *Buckley* have not stemmed the tide of huge donations and expenditures that has overwhelmed modern political campaigns. *See McConnell*, 124 S. Ct. at 661-666. But while corruption concerns affect local government as well as federal government, different interests also drive local governments' efforts to shape their electoral processes.

This Court has not, in the time since *Buckley*, had occasion to consider how and to what extent concerns other than corruption or the appearance of corruption balance the well-recognized First Amendment considerations implicated by campaign finance restrictions governing local elections. Albuquerque's experiment in campaign-finance reform represents a local solution to local problems, even if the problems are present at the state and federal level as well. *Buckley*'s standard of strict scrutiny review for expenditure limits also recognized that campaign expenditure limits could

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[4] *Homans v. City of Albuquerque*, 366 F.3d 900, 916-920 (10th Cir. 2004).

be justified by interests beyond corruption. And given the importance of these other interests to the integrity of local elections, federalism concerns warrant a different and more flexible balancing of these interests against recognized First Amendment concerns when the limitations apply solely to local elections. *Amici* respectfully request that the Court grant the City of Albuquerque's petition for a writ of *certiorari* in order to address these important issues.

REASONS FOR GRANTING THE WRIT

I. *BUCKLEY* DOES NOT PRECLUDE STATE AND LOCAL REGULATION OF CAMPAIGN EXPENDITURES.

The Tenth Circuit erroneously applied *Buckley v. Valeo*, 424 U.S. 1 (1976), effectively to preclude all limitations on campaign expenditures, including the regulation at issue here. But *Buckley* expressly left open the possibility that expenditure limits, when sufficiently tailored, can pass constitutional muster. This case presents such a possibility, and the opportunity squarely and cleanly to consider important local interests beyond the interest in avoiding corruption.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA"), which Congress passed in order to prevent corruption and the appearance of corruption in the electoral process. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id*. at 55-58. On the record before it, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify…[the] campaign finance expenditure limitations." *Id*. at 55 (emphasis added). The Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh relevant First Amendment concerns.

The Court has never considered the constitutionality of a purely local regulation of local election expenditures. *Buckley* related solely to a federal regulation of federal candidates and did not consider whether campaign expenditure limits for state or local elections were constitutional. No decision of this Court since has addressed expenditure limits governing state or local elections. And the analysis of Albuquerque's expenditure limits should take into account that it is a local regulation of local elections, a distinction from *Buckley* that changes the constitutional calculus in at least two ways. First, the local electorate's authority to decide how local representatives are selected represents a significant interest in its own right. Second, the smaller scale, structure and process of local government warrant a greater weighting of the interests above and beyond corruption that justify campaign expenditure limitations and temper countervailing First Amendment concerns.

II. STATE AND LOCAL REGULATION OF ELECTIONS, AND THE POWER OF STATES AND LOCALITIES TO GOVERN THEMSELVES, COMPEL A DIFFERENT (AND MORE DEFERENTIAL) BALANCING OF THE INTERESTS BEARING ON EXPENDITURE RESTRICTIONS.

The undeniable fact that expenditure limits implicate the First Amendment does not end the inquiry. First Amendment concerns must be balanced against competing constitutional concerns, *see McConnell*, 124 S. Ct. at 656 (considering competing interests such as the integrity of the electoral process), including other First Amendment concerns. In the specific case of the Albuquerque expenditure limits, a number of competing interests should be considered and balanced along with anti-corruption interests, among them (1) the local electorate's interest in governing its own elections and (2) Albuquerque's interest in protecting the integrity of its government.

Albuquerque's first obvious and fundamental interest lies in the undeniable right of its citizens to determine their own form of government and regulate their own elections. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).[5] The right of citizens to determine how their state and local officials are to be elected appears in the text of the Constitution, *see, e.g.*, Art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.") (citation omitted), and has been affirmed repeatedly by this Court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) ("the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government'" and "is a power reserved to them" by, *inter alia*, the Guarantee Clause); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (a state has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders").[6]

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[5] *See also Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."); *Duncan v. McCall*, 139 U.S. 449, 461 (1891) ("the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws").

[6] *See also Bates v. Jones*, 131 F.3d 843, 859 (9th Cir. 1997) (Rymer, J., concurring) ("to define how the [people of California] want to be represented is a right secured to the citizens of each state"), *cert. denied*, 523 U.S. 1021 (1998); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for*

The citizens of Albuquerque have the right to decide how to elect their representatives to city-wide office and that interest merits significant weight in any analysis of local campaign-finance regulations.[7] The Court has explained in the Fourteenth Amendment context that it "has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. [R]ather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscription of the Fourteenth Amendment." *Gregory*, 501 U.S. at 468. In other contexts, the Court has calibrated the level of scrutiny to accord greater deference to local decision-making in matters falling deeply within the prerogatives of state and local officials. So, for example, the Court deferred to a state's requirement of citizenship as a qualification for certain offices because "our scrutiny will not be so demanding where we deal with matters resting firmly

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the Guarantee Clause, 65 U. Colo. L. Rev. 815, 816 (1994) ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 41 (1988) ("The guarantee clause . . . grants states control over their internal governmental machinery.").

[7] *See* Thomas Jefferson, *Drafts of the Kentucky Resolution of 1798*, in *The Works of Thomas Jefferson in Twelve Volumes* 458, 463-464 (Paul Leicester Ford ed., G.P. Putnam's Sons, 1904) (1798). Thus it is for the States or the people "to retain to themselves the right of judging how far the licentiousness of speech and the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." *Id.; see also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 222 (1998) (suggesting that the First Amendment should be treated differently when it is applied to the states under the doctrine of incorporation).

within a State's constitutional prerogatives." *Sugarman*, 413 U.S. at 648; *see also Gregory*, 501 U.S. at 462-463 (scrutiny is "less exacting" of state laws determining the qualifications of state officials). By unduly limiting the weight it accorded Albuquerque's right to govern and its interest in governing its own elections, the Tenth Circuit undervalued local interests of independent constitutional significance.

These local interests are particularly strong, and worthy of federalist deference, in cases (such as this) where voters enacted the expenditure limits by referendum. The Court has signaled the important deference to be afforded voter decisions in cases "dealing not merely with government action, but with a...provision approved by the people...as a whole." *Gregory*, 501 U.S. at 470. Justice O'Connor concluded that such provisions reflect the rational judgment of citizens who voted for the provision. *Id*.; *see also California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty…. In my view, principles of federalism require us to respect the policy choice made by a State's voters."); *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1098 (9th Cir. 2003) (upholding campaign finance reform initiative and explaining that "[t]he voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of their electoral process") (citing *FEC v. Beaumont*, 539 U.S. 146, 123 S. Ct. 2200, 2208-09 (2003)). Thus there can be no danger that incumbent politicians imposed Albuquerque's expenditure limit to protect their own positions.[8] The citizens of Albuquerque overwhelmingly voted for the expenditure limitation to prevent what they perceived as a threat to their

[8] *Cf. Nixon*, 528 U.S. at 402 (Breyer, J., concurring).

control of their own elected officials. This is a judgment that the Tenth Circuit decision did not respect adequately.

A second and equally important interest supporting expenditure limits lies in the stated rationales for Albuquerque's campaign expenditure limits. Preventing actual or apparent corruption, promoting electoral competition, and reducing officeholders' time devoted to fundraising[9] – all are directed at the underlying goal of ensuring effective representative democracy, a goal that the United States, including the federal judiciary, has a constitutional obligation to help local government achieve. *See* Art. IV, § 4; *Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *see generally* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee. L. Rev. 767 (2003).

To foster effective representative democracy, the First Amendment interest of the candidate must be weighed against the integrity of the electoral process and the public's First Amendment interest in having and participating in vigorous and inclusive political debate. *See McConnell*, 124 S. Ct. at 656; *Nixon*, 528 U.S. at 400-402 (Breyer, J., concurring). The Court below failed to give sufficient weight to the First Amendment interest of Albuquerque's electorate in open public debate and equal participation. This Court has recognized Congress' goal of facilitating communication between candidates and their electorates as a valid purpose of campaign finance reform. *See Buckley*, 424 U.S. at 91; *FEC v. NCPAC*, 470 U.S. 480, 515 (1985) (White, J., dissenting).

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[9] *Homans*, 366 F.3d at 907. Apart from the competing constitutional interest of strengthening representative government, these rationales also represent valid compelling government interests justifying the restrictions imposed by Albuquerque's expenditure limits under the strict scrutiny analysis set forth by this Court in *Buckley* for federal expenditure limits. *Id*. at 908, 911-912, 913.

Today's unlimited-expenditure campaigns stifle the voices of the majority of the electorate because the bulk of campaign spending goes toward the purchase of costly broadcast media campaign speech that is controlled by a small group of wealthy contributors.[10] And as the broadcast speech drowns out other forms of expression, the ordinary electorate struggles for any effective means of raising its own issues and influencing the debate and discussion that leads to informed electoral choices.

The current system of unlimited expenditures has not protected the First Amendment's guarantee of a fair and open democratic process.[11] Modern spending levels discourage challengers from participating in the electoral process; and the resulting elimination of competition smothers meaningful discussion of political issues. *See* Homans App. 322-323, 493. Because a central purpose of the First Amendment is to encourage and protect participation in the democratic process, Albuquerque's efforts to promote speech and encourage participation through expenditure limits, thus ensuring the electorate's First Amendment rights, must be given due weight when balanced against the individual candidate's First Amendment interest in unlimited spending.

Albuquerque's interest in protecting and strengthening its own representative government outweighs *competing* First Amendment concerns. "[P]reserving the integrity of the electoral process… is [an] interest[] of the highest importance." *See First National Bank v. Bellotti*, 435 U.S. 765, 788-789 (1978). Albuquerque's expenditure limitations

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[10] *See, e.g.*, James V. Grimaldi and Thomas B. Edsall, *Super Rich Step Into Political Vacuum: McCain-Feingold Paved Way for 527s*, Wash. Post, Oct. 17, 2004, at A01.

[11] *See, e.g.,* Burt Neuborn, *Toward a Democracy-Centered Reading of the First Amendment,* 93 Nw. U. L. Rev. 1055, 1059 (1999).

promote the general constitutional objective of open and active representational democracy by allowing a broader segment of the electorate to run for office, by reducing the impression that campaigns are bought and sold by wealthy contributors, and by liberating officials and candidates from the constant need to neglect substantive matters for fundraising responsibilities.[12] For 26 years, Albuquerque's experiment with reasonable expenditure limits led to greater trust in local elections. *See* Homans App. 352, 353. Expenditure limits promoted greater competition and public participation in local elections. *See* Homans App. 234-237, 316-320, 325. "Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process," *California Democratic Party*, 530 U.S. at 587 (Kennedy, J., concurring), and thus, the local electorate's responsibility for operating its own government, especially when combined with its interests in preserving the health of representative government, outweighs any incidental infringements on free speech from reasonable limits on local candidates' campaign expenditures.

III. THE NATURE OF LOCAL GOVERNMENT FURTHER TEMPERS CANDIDATES' FIRST AMENDMENT CONCERNS HERE.

The structure and purpose of local government vary significantly from those of the federal government. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." The Federalist, No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). Local governments regulate land development, maintain roads, provide water and sewer services, ensure the safety of the

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[12] *See, e.g.*, *Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *id*. at 390-392; *id*. at 409 (Kennedy, J., dissenting).

community, and respond to the daily concerns of constituents. These tasks require local government officials to be more directly involved in the day-to-day minutiae of their communities than representatives to the federal government might be. Local officials focus their understanding of local needs differently and interact differently with individuals and local businesses than representatives with broader constituencies.

By design, local government officials are more acutely aware than their federal counterparts of the day-to-day local needs of local constituents. Although in theory local officials should be more accessible and devote more time to individual constituent needs than their federal counterparts, the record below reflects that an absence of expenditure limits will require many local officials to focus inordinate time on raising campaign funds in order to avoid being outspent by opponents. *See* Homans App. 206, 214. The need for unlimited campaign dollars forces elected officials to devote attention to identifying and responding to an ever-increasing number of contributors.

Local officials' intimate relationship with constituents only heightens the potential for and fallout from local corruption or the appearance of local corruption. Local government officials frequently are responsible for contracts and other forms of purchases from vendors of public services who are often major contributors to the official's campaign. In smaller geographic areas, where local officials are more likely to be connected to constituent businesses on a personal level, money poured into a candidate's war chest, even in limited amounts, may well be viewed as a *quid pro quo* when the sum of these contributions greatly outweighs other candidates' funds. This corruption or perceived corruption lessens the confidence of citizens in their local government. The citizens of Albuquerque enacted campaign expenditure limits specifically to combat this possibility, and for the other reasons noted above as well. *Cf. Nixon*, 528 U.S. at 394.

The opportunity for corruption has special significance at the local level for other reasons as well. For example, the political weight of a dollar in a local or state election may be greater than the same dollar in a federal election. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997). The more money that appears in the electoral system, the greater the potential for and appearance of corruption. Moreover, local media and local political opponents may well be less able to devote scarce time and sparse resources to investigating and combating corrupt fundraising practices.[13]

If a dollar weighs more in local elections, the need for more dollars diminishes. In local elections, a smaller geographic area or a smaller number of constituents allows candidates to communicate through less expensive media than candidates for federal office. Local candidates need not undertake or finance large-scale media campaigns across multiple markets to communicate their message to voters. Because the cost of running a local election is often far less than a federal campaign, reasonable expenditure limits at the local level are unlikely to "drive the sound of a candidate's voice below the level of notice" and thus infringe on the candidate's First Amendment right of free speech. *Cf. Nixon*, 528 U.S. at 397. This plain difference in scale compels a different balancing of interests when analyzing expenditure limitations in a local election than the Court applied when analyzing the federal expenditure limits at issue in *Buckley*.

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[13] *See* Nancy Northrup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1681 (1987); Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Intl. & Comp. L. 793 (2001).

IV. STATE AND LOCAL GOVERNMENTS NEED GREATER FLEXIBILITY THAN THE DECISION BELOW ALLOWS TO SOLVE THE PROBLEMS ASSOCIATED WITH FINANCING OF STATE AND LOCAL ELECTIONS.

Citizens have the greatest interest and the most intimate familiarity with the particular concerns of their states and localities:

> The first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. . . . By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these the people will be more familiar[]. . . .

The Federalist, No. 46, at 294-295 (James Madison) (Clinton Rossiter ed., 1961). As in those early days, citizens and their local leaders are still most familiar with the issues and problems that plague their local electoral systems. Their efforts to formulate appropriate measures to secure their chosen form of government are, therefore, entitled to appropriate deference – a deference not apparent in the Tenth Circuit's analysis of Albuquerque's expenditure limits.

Our system of federalism encourages states and localities to experiment in their electoral systems to provide novel solutions to the problems associated with campaign financing. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But the rigid application of *Buckley* has handcuffed localities and states who wish to address the problems that plague their local systems—

systems that the voters and local legislators understand far better than the federal courts. In order for local governments to protect and maintain truly representative democracies that are free from corruption, states and localities must be allowed to serve as the testing grounds for new forms of campaign finance reforms.

From the very founding of our nation, States and localities have in fact served as laboratories for innovations in government. The federal constitution was modeled after the constitutions of the individual states, and federal initiatives have often been derived from state innovations such as the extension of the vote to African-Americans, women, and eighteen-year-olds; the abolition of slavery; the direct election of U.S. Senators; workers' compensation legislation; minimum wage laws; and many significant environmental regulations. *See* Frederick Schwarz, *From the Ground Up: Local Lessons From National Reform*, 27 Fordham Urb. L. J. 5, 16-19 (1999). Even after enactment of the Bipartisan Campaign Reform Act, an extraordinary effort at comprehensive reform, the flow of large contributions to support candidates haunts elections at all levels of government across the country. *See* Grimaldi & Edsall, *Super Rich Step Into Political Vacuum,* Wash. Post, Oct. 17, 2004, at A01; *see also McConnell*, 124 S. Ct. at 706 ("Money, like water, will always find an outlet."). The job of reforming the broken system of campaign financing remains unfinished, and can best be achieved by allowing for innovation in local and state election systems.

The Court may have very few other opportunities to recalibrate the balance of constitutional interests bearing on campaign expenditure limits in the state and local context. Many states and localities apparently have taken *Buckley* to prohibit expenditure reforms outright[14] – an outcome the

[14] The National Conference of State Legislatures, for example, cautions that "the court has ruled that spending limits are

Tenth Circuit's opinion only reinforces. The Vermont expenditure limits addressed in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *petition for rehearing pending*, are the only other state-level expenditure limits known to these *amici*, who are active participants in campaign finance legislative efforts around the country.[15] To *amici*'s knowledge, no other localities have expenditure limits in place any more.

The Court should take this case to correct the assumption, made by the Court below and many other courts, state legislatures, and local governments, that the First Amendment categorically forbids any limits on the high level of campaign spending in state and local races. With the benefit of almost 30 years of experience since *Buckley*, in Albuquerque and elsewhere, this case presents an opportunity for the Court to calibrate the important differences in the balance of constitutional considerations affecting state and local elections and to account for the appropriate role of federalism and the value of local electoral participation in the scrutiny of local governments' innovations in the pursuit of democracy.[16]

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constitutional only if they are optional." *Campaign Finance at* http://www.ncsl.org/programs/legman/about/campfin.htm.

[15] It is unclear when and if *Landell* will reach this Court. The case has been pending in the Second Circuit since the August 2000 Term, a petition for rehearing *en banc* is currently pending, and the panel opinion called for a remand for further fact finding on the expenditure limit issue.

[16] As Justice Kennedy has stated, "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should grant the City of Albuquerque's petition for a writ of *certiorari*.

Respectfully submitted,

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